ServiceMaster Aviation Services *and* Allied Services Division, Transportation Communications International Union, AFL–CIO, Petitioner. Case 5–RC–14385

May 15, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On August 7, 1996, the Petitioner filed a petition seeking to represent all full-time and regular part-time skycaps employed by the Employer at National Airport in Washington, D.C. The Employer asserts that it is directly controlled by American Airlines, a common carrier subject to the jurisdiction of the Railway Labor Act (RLA), and that, therefore, the National Labor Relations Board (the Board) lacks jurisdiction under Section 2(2) of the National Labor Relations Act (the Act). After a hearing, the Regional Director transferred the proceeding to the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this case, the Board finds:

American Airlines (American) contracts with ServiceMaster Aviation Services (the Employer or SAS), a company that provides aviation services to commercial air carriers, with respect to skycaps and related services.

The uncontroverted evidence reveals that American exercises extensive control over almost all aspects of the operation of SAS as it relates to supplying skycaps and related services to American. SAS utilizes American's job descriptions and trains its employees pursuant to programs specified by American. In fact, many SAS employees are trained at American's training facility in Ft. Worth, Texas.

It is also undisputed that SAS submits all personnel information concerning each applicant for employment to American for its approval before new employees are permitted to begin work. Moreover, American has the right to audit or inspect SAS's personnel records and, should American and SAS terminate their contractual relationship, all SAS's personnel records become the property of American.

The uncontroverted evidence further reveals that American determines both the staffing levels and scheduling of SAS employees, requires them to consistently perform their work in accordance with American's ''Specification Documents,'' routinely evaluates SAS employees, and has the unfettered right to remove any employee who does not meet its qualifications in any respect. Further, American requires SAS employees to wear American Airlines uniforms and to appear to the public as American Airlines employees. Although SAS purchases and provides its employees with these uniforms, they must conform to American's specifications. Additionally, the SAS employees' name tags bear the American Airlines logo. Moreover, all equipment used by SAS employees is the property of American Airlines and American provides SAS' general manager, Ronald Eugene Pepper, with the office space he requires.

Section 2(2) of the National Labor Relations Act provides that the term ''employer'' shall not include ''any person subject to the Railway Labor Act.'' 29 U.S.C. § 152(2). Similarly, Section 2(3) of the Act provides that the term ''employee'' does not include ''any individual employed by an employer subject to the Railway Labor Act.'' 29 U.S.C. § 152(3). The Railway Labor Act (RLA), as amended, applies to rail carriers and to:

> every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service.

45 U.S.C. § 151 First and 181. The Railway Labor Act was extended to carriers by air by amendments enacted in 1936.

On November 7, 1996, the Board requested that the National Mediation Board (NMB) study the record in this case and determine the applicability of the Railway Labor Act to the Employer. The NMB subsequently issued an opinion indicating that, in its view, the Employer is a carrier subject to the Railway Labor Act. *ServiceMaster Aviation Services*, 24 NMB 186 (1997).[1]

[1] The NMB uses a two-pronged jurisdictional analysis where the company is a separate corporate entity and does not fly aircraft for the public transportation of freight or passengers. Under the first prong of the test, known as the ''ownership or control'' prong and derived from the language of the Railway Labor Act, the NMB determines whether a common carrier exercises direct or indirect ownership or control of the entity. Thus, 45 U.S.C. § § 151 First and 181 state that ''the term 'carrier' includes . . . any company which is directly or indirectly owned or controlled by any carrier . . . .'' *Delpro Co. v. Railway Carmen*, 519 F.Supp 842, 848 and fn. 14 (D.C. Del. 1981), affd. 676 F.2d 960 (3d Cir. 1982), cert. denied 459 U.S. 989 (1982). See also *Ground Services, Inc*., 7 NMB 509, 509–510 (1980). The second prong of the test, known as the ''function'' prong, is also derived from 45 U.S.C. § 151 First. For NMB's jurisdiction to attach to the noncarrier under the carrier's control, the RLA states that the entity must be one ''which operates any equipment or facilities or performs any service . . . in connection with the transportation, receipt, delivery . . . transfer in transit . . . and handling of property transported . . .''). *Delpro Co*., supra, 676 F.2d at 964. In this part of the test, the NMB determines whether the work is traditionally performed by employees of air or rail carriers.

Having considered the facts set forth above in light of the opinion issued by the NMB, we find that the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the NMB pursuant to Section 201 of Title II of the Railway Labor Act. Accordingly, we shall dismiss the petition.

Unlike our dissenting colleague, we defer to the NMB's determination that it has jurisdiction. Although our dissenting colleague refers in passing to the two-part jurisdictional test that the NMB properly applied,[2] he rejects the NMB's conclusion in this case. Essentially relying on a test set out in *Trans World Airlines*, 211 NLRB 733 (1974), he would find that the NMB has jurisdiction ''only when the employees perform services which have a substantial connection to a carrier's operations.'' In *Trans World Airlines*, the Board addressed the jurisdictional question with regard to petitioned-for employees who were directly employed by the air carrier but worked at the employer's visitors information center at the Cape Canaveral Space Center providing support services for visitor tours of the Space Center. Concluding that the employees were in no way engaged in activity involving airline transportation functions, the Board said that ''there must be a more direct connection between the employees and the transportation function so as to warrant the special considerations for which Congress enacted the Railway Labor Act.''[3]

The ''substantial'' or ''direct connection'' test essentially relied on by our dissenting colleague derives from and applies in cases, like *Trans World Airlines*, where the petitioned-for employees are employed directly by an air carrier. In those cases, the jurisdictional issue arises because the work of the petitioned-for employees allegedly bears such a tenuous, negligible, or remote relationship to the carrier's transportation activities.[4] See *Pan American World Airlines v. Carpenters*, supra, 324 F.2d at 221 fn. 3. By contrast, in cases such as this one, where the petitioned-for employees are employed by a separate corporate entity that does not fly aircraft for the public transportation of freight or passengers, the proper jurisdictional test is the two-pronged test derived from the Railway Labor Act itself and used by the NMB here. The Board made this distinction in *System One Corp.*, 322 NLRB 732 (1996), where it applied the NMB's two-part test and found that the respondent was not subject to the jurisdiction of the RLA. In so finding, the Board pointed out that, contrary to the judge, it was not applying the *Trans World Airlines* test, ''because the instant case does not involve employees employed directly by an air carrier.'' Id. at fn. 6.

Contrary to our dissenting colleague, we do not perceive any incongruity in the application of the NMB's jurisdictional test for noncarriers and our own jurisdictional test for carriers. Where the Board has asserted jurisdiction over carriers, it has done so only when the employees in the petitioned-for unit did not perform transportation related services within the purview of the RLA. See *Trans World Airlines*, 211 NLRB 733 (1974). Where the NMB asserts jurisdiction over noncarriers, it does so only when the carrier sufficiently controls what the NMB, in its expertise, determines to be the traditionally transportation-related work of the employees in the petitioned-for unit. See footnote 1, supra. Both tests, although applied to different types of employers, focus on the relationship between the work performed by the employees and the transportation activities covered by the RLA. The differing standards allow both agencies to avoid assumptions about jurisdiction based solely on the identity of the employing entity. Thus, the Board's test assures that employees are not denied the protections of the NLRA simply because they are employed by a carrier and the NMB's test assures that the carriers' transportation function is not unduly hampered simply because the particular employees who perform integrally related functions under the carriers' control work for a noncarrier.

Lastly, our dissenting colleague also claims that work performed by the petitioned-for employees

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The NMB requires that both prongs of the test must be met in order for it to assert jurisdiction under the RLA. *United Parcel Service*, 318 NLRB 778, 779–780 fn. 7 (1995), enfd. 92 F.3d 122 (D.C. Cir. 1996). In its opinion, the NMB concluded that both prongs of the test had been met.

[2] Contrary to the implication of the dissent, the NMB here did not make any ''sweeping assertions of jurisdiction.'' It simply applied its traditional two-part jurisdictional test. See *ServiceMaster Aviation*, supra, 24 NMB at 187–190.

[3] The Board cited *Pan American World Airlines v. Carpenters*, 324 F.2d 217 (9th Cir. 1963), cert. denied 376 U.S. 964 (1964), as support.

[4] Applying the *Trans World Airlines* test, our dissenting colleague concludes that the skycaps petitioned for here bear a relationship ''tangential at best'' to American's air carrier function. Regardless of the applicability of that test, we disagree. Surely, most passengers would attest that skycaps bear a ''substantial'' or ''direct connection'' to an airline's transportation functions. Although a passenger might well arrive at the airport via taxi cab or purchase food, newspapers, and souvenirs from vendors within the airline terminal, the services provided directly by these cabdrivers and vendors to the passengers do not, as our dissenting colleague suggests, have the same relationship to the airline's transportation function as do the skycaps herein. Among other things, skycaps assure that the passenger's baggage is placed on the proper flight, arrives at the proper destination at the correct time, and is properly claimed. True, the skycaps do not pilot the plane or serve the meals. But, most definitely they provide an integral, direct, transportation related service to airline passengers by handling their baggage, all of which has been, or ultimately will be, transported by the carrier itself. We agree that the cabdrivers and vendors have a tangential relationship to air transportation. Indeed, the relationship is purely coincidental, as their activities could be carried out anywhere. On the other hand, skycaps, by definition, work at an airport and are directly related to air transportation. The closest analogy is to the railroad station porter who has traditionally been covered by the RLA and whose work is integrally and directly related to rail transportation. *St. Paul Union Depot Co.*, 1 NMB 181 (1940).

''would normally be covered by the NLRA.'' Again, however, as the Board made clear in *System One*, supra, 322 NLRB at 732, part one of the NMB's jurisdictional test focuses on ''whether the nature of the work performed is that traditionally performed by employees of air or rail carriers,'' not on whether the work performed ''would normally be covered by the NLRA.'' Here, the NMB has found that the skycaps' work is that ''traditionally performed by employees of air or rail carriers.'' We defer to that conclusion.

Accordingly, we find no merit in our dissenting colleague's contentions.

ORDER

It is ordered that the petition in Case 5–RC–14385 is dismissed.

CHAIRMAN GOULD, dissenting.

I would assert jurisdiction over this Employer and its employees. For the reasons set forth below, I dissent from my colleagues' refusal to do so.

On August 7, 1996, the Union initiated this case by filing a representation petition under Section 9 of the National Labor Relations Act (NLRA). In determining whether to direct an election, we must consider the Employer's claim that the Board has no jurisdiction because the Railway Labor Act (RLA) covers the Employer's operations and its employees in the petitioned-for unit. On November 7, 1996, in accordance with its practice of referring cases involving RLA jurisdictional claims, the Board requested a ruling from the National Mediation Board (NMB).[1] In an opinion dated March 10, 1997, the NMB concluded that the petitioned-for employees are subject to the jurisdiction of the RLA.[2] My colleagues have accepted this opinion and deferred to it. I do not.

The starting point in this analysis is, of course, the plain language of the statutes involved. The definition of ''employer'' in Section 2(2) of the NLRA excludes ''any person subject to the Railway Labor Act,'' and the definition of ''employee'' in Section 2(3) excludes ''any individual employed by an employer subject to the Railway Labor Act.'' This exclusionary language represents an express Congressional mandate that the Board should not ''tread upon the ground covered by the Railway Labor Act,''[3] and the Board cannot expand its jurisdiction at the expense of the NMB. However, it seems equally clear that the NMB should not expand its jurisdiction at the expense of the Board. And in the instant case as well as in recent litigation before both agencies, this is in fact what has happened.[4]

In 1926, Congress enacted the RLA because it thought it was necessary that railroad transportation of persons and property should not be interrupted by labor disputes. At that time, there were no federal labor relations statutes applying generally to industry, and railroad labor was given certain advantages over other labor, but it was subjected to certain restraints, and strikes were forbidden unless and until mediation and other procedures provided for in the RLA had been followed.[5]

Under the RLA, a ''carrier'' is defined as ''any company which is directly or indirectly owned or controlled by or under common control with any carrier . . . which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation . . . and handling of property transported by railroad.''[6] Airline operations were added to the jurisdiction of the RLA by the 1936 amendments.[7] The RLA's definition of an employee of an air carrier includes, ''every air pilot or other person who performs *any work* as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.'' 45 U.S.C. § 181. (Emphasis added.) The NMB has read the RLA's coverage to be not limited to air carrier employees who fly or maintain aircraft, but ''to extend to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight.''[8]

The Board, in contrast, has previously rejected such sweeping assertions of jurisdiction. In *Trans World Airlines*, 211 NLRB 733 (1974), the Board asserted jurisdiction over employees at the visitors information center at Cape Canaveral Space Center where they were engaged in providing various support services for visitor tours. The Board stated that

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[1] I dissented from the referral. In my view, the Board has the authority, the expertise, and the responsibility to decide matters of its own jurisdiction in cases initiated before it. See my dissenting opinion in *Federal Express Corp.*, 317 NLRB 1155 (1995).

[2] 24 NMB 186 (1997).

[3] *Teamsters Local 25 v. New York, New Haven & Hartford Railroad Co.*, 350 U.S. 155, 159 (1956).

[4] See those cases involving jurisdiction over the Federal Express Corporation: 317 NLRB 1155 (1995); 23 NMB 32 (1995); and 323 NLRB 871 (1997).

[5] *Pan American World Airways v. Carpenters*, 317 F.2d 217, 219 (9th Cir. 1963).

[6] 45 U.S.C. § 151 First.

[7] 45 U.S.C. § 181 provides that ''All of the provisions of subchapter I of this chapter except section 153 of this title, are extended to and shall cover every common carrier by air.''

[8] *Federal Express Corp.*, 23 NMB 32, 71 (1995). When the employer is not itself an air carrier, as in the instant case, the NMB determines jurisdiction through a two-part test. First, it determines whether the nature of the work performed is that traditionally performed by employees of rail or air carriers. Second, it determines whether a common carrier exercises direct or indirect ownership or control over the entity. Both parts of this test must be satisfied for the NMB to assert jurisdiction. See *Sky Valet*, 319 NLRB 1243 fn. 2 (1995); and *Sapado I (Dobbs International Services)*, 18 NMB 525 (1991).

> [w]here a group of employees are involved in work which would normally be covered by the National Labor Relations Act, the mere fact that the employer is one within the definitional sweep of the Railway Labor Act will not serve to bar this Board's jurisdiction. There must be more direct connection between the employees and the transportation function so as to warrant the special considerations for which Congress enacted the Railway Labor Act.

The Board cited *Pan American World Airways v. Carpenters*, 324 F.2d 217 (9th Cir. 1963), cert. denied 376 U.S. 964 (1964), as support. In *Pan American*, the court held that the RLA did not apply to the carrier's housekeeping services at the Atomic Energy Commission's Nuclear Research Development Station at its Nevada Test Site under a contract that had nothing to do with transportation by air. The Ninth Circuit noted that

> [T]he Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities. It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the work included carrier activities within its company functions.[9]

The court concluded that the RLA, a highly specialized and distinct set of labor laws tailor-made for employees engaged in the transportation industry and intended to ensure that transportation is not interrupted, should not be applied to other employees having nothing to do with the transportation.

Since the Board and the courts have rejected a claim of NMB jurisdiction where the work of employees directly employed by a carrier lacked a substantial connection to the transportation activity for which the RLA was enacted, the connection between the work performed and the transportation activity *must* be at least as substantial for NMB jurisdiction when the employer is not a carrier. In cases involving noncarriers, however, the NMB's assertion of jurisdiction has turned almost entirely on corporate structure[10] or the degree of control the carrier exerts through its contract with the noncarrier.[11] The carrier's degree of control is determinative because it appears that the NMB finds that most work is of a type ''traditionally performed'' by airline or railroad employees regardless of the relationship between the work and the transportation function.[12]

In my view, the application of the RLA, a specialized labor law created by Congress for those who work in the rail and air transportation industry and for the purpose of assuring that rail and air transportation may not be interrupted, should initially be based on the relationship between the work performed by the employees and the transportation activities covered by the RLA. Thus, regardless of whether the employer is a carrier or a noncarrier, in deciding whether to assert jurisdiction, the Board should determine whether the work performed by the employees bears a substantial connection, i.e., more than a tenuous, negligible, and remote relationship, to the transportation activities covered by the RLA.

In the instant case, the employees at issue are ''skycaps'' and other employees who perform services for American Airlines at National Airport pursuant to a contract between ServiceMaster and American Airlines. The skycaps are responsible for curbside checkin of passenger baggage for American Airlines' flights and provide wheelchair transport assistance to American Airlines' passengers. To be sure, the work of these employees is related to the air transportation of passengers and goods. In my view, however, their relationship to air transportation is tangential at best and not an integral part of American's carrier function.

The work of the skycaps is a service to passengers and therefore an aid to the airline, but it is not required for the carrier to function. The terminals at National

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[9] 324 F.2d at 223 (quoting *Northwest Airlines v. Jackson*, 185 F.2d 74 (8th Cir. 1950)). The *Pan American* court noted that, after its opinion was written, it was advised that on October 29, 1963, the NMB asserted jurisdiction over the Nevada Test Site on the basis that the employer was a common carrier by air engaged in interstate commerce and that the individuals performed work for the carrier as employees. 324 F.2d at 223 fn. 2. Characterizing the NMB's reasoning as unpersuasive, the court stated that it would adhere to ''what we had decided before receiving the advice'' from the NMB. Id.

[10] *O/O Truck Sales*, 21 NMB 258 (1994). (Where a carrier and an entity performing work traditionally performed by industry employees are commonly owned by a holding company, the NMB finds the entity subject to the RLA). See also *Chelsea Catering Corp.*, 19 NMB 301 (1992). (Chelsea wholly owned by CHI which also owned carriers Continental and Continental Express subject to RLA); *AMR Services Corp.*, 18 NMB 348 (1991). (AMR Services, which, with American Airlines and American Eagle commonly owned by AMR Corporation, subject to RLA).

[11] In *Ogden Aviation Services*, 20 NMB 181 (1993), and *New York Interstate Service*, 14 NMB 439 (1987), the work performed by the employees at issue in each case was security and preboard screening of passengers and baggage. In *New York Interstate Service*, the NMB asserted jurisdiction based on the control of Interstate's operations exercised by American Airlines. The NMB declined to assert jurisdiction in *Ogden Aviation*, however, finding that the contracts between Ogden and its airline customers illustrate the lack of significant direct or indirect control between the carriers and the contractor.

[12] In *Crew Transit, Inc.*, 10 NMB 64 (1982), for example, the NMB found that bus drivers who transported flight crews between Los Angeles International Airport and various hotels performed work of a nature traditionally performed by carrier employees. The NMB reasoned that transportation of flight crews would be subject to the RLA if performed directly by employees of the carrier. 10 NMB at 69. In *Air Cargo Transport, Inc.*, 15 NMB 202, 203 (1988), the NMB concluded that drivers who pick up and deliver air freight were engaged ''in work which is performed by employees in the airline industry.''

Airport must also be kept clean and the floors swept but it is hard to argue that Congress intended that employees providing those services be subject to the waiting periods and mediation provisions of the RLA to ensure that air transportation be kept moving. Such work is properly within the jurisdiction contemplated by the NLRA.[13] It appears, however, that the NMB would assert jurisdiction over any employees performing a function that aides an airline, no matter how incidental that service is to the air carrier's function so long as the employing entity is either a carrier or directly or indirectly owned or controlled by a carrier.[14] In my view, the Board should reject this expansive assertion of jurisdiction over such functions. Rather, as discussed above, we should find that the NMB has jurisdiction only when the employees perform services which have a substantial connection to a carrier's operations.[15]

In 1995, the Board conducted an election and certified the Union as the exclusive bargaining representative of these skycaps and other employees who performed related services for American Airlines at National Airport. At that time, the skycaps were employed by a different employer, the Huntleigh Company, and there is no evidence that a jurisdictional question was raised before the Board.[16] The work of these employees has not changed. The only change has been in the employing entity. The circumstances of the instant case, where it appears that the sole basis for now asserting RLA jurisdiction over these employees is that American Airlines has more control over the manner in which they perform their jobs, illustrate how employees who do not have a substantial connection to the carrier's operations are being transferred back and forth between NLRB and NMB jurisdiction.[17] By sharply defining those job functions that are closely related to an air carrier, however, it is less likely that the employees performing services of a type that would normally be under the jurisdiction of the NLRA will be shifted back and forth between statutes. The more substantial the connection between the air carrier and its essential operations, the less likely that jurisdiction may shift between the NLRB and the NMB based solely on the nature of the employer's contractual relationship with an air carrier.[18]

My colleagues insist that I have not applied the ''proper'' NMB jurisdictional test. My interest, however, is in properly determining the jurisdiction of the National Labor Relations Board.

Accordingly, I would find that the petitioned-for employees are involved in work that would normally be covered by the NLRA, and that their jobs are at most an incidental service to the air carrier. I therefore dissent from my colleagues' decision to defer to the NMB and dismiss the petition.

[13] In *Sky Valet*, 23 NMB 155 (1996), however, the NMB asserted jurisdiction over employees providing cleaning and janitorial services at the Trans World Airline terminal at Logan International Airport. As in the instant case, prior to Sky Valet's obtaining the cleaning services contract from a predecessor employer, Precision Cleaning, Inc., the Board had certified the Service Employees International Union (SEIU) as the collective-bargaining representative of the employees at issue.

[14] As discussed above, the NMB has held that any employee of a carrier, regardless of their function is within the jurisdiction of the RLA. With regard to noncarriers, one part of the two-part jurisdictional test requires that the work of the employees at issue be of a type ''traditionally performed'' by employees of a carrier.

[15] My colleagues state that the skycaps provide a direct service to the airline passengers. So, of course, do the cabdrivers who transport the passengers to and from the airport and the vendors in the terminal who sell the passengers food, newspapers, and souvenirs. The provision of this service directly to airline passengers, however, does not bring those employees within the jurisdictional sweep of the RLA.

[16] There is no contention that the current employer, Servicemaster, is a successor to Huntleigh or otherwise has a bargaining relationship with the Union.

[17] In *Huntleigh Corp*., 14 NMB 149 (1987), and *Airport Services*, 15 NMB 70 (1988), the NMB declined to assert jurisdiction over skycaps because of the degree of autonomy retained by the employer under its contracts with the airline.

[18] In certain circumstances, including this case, the employer's contract with the RLA carrier may impose certain limitations on the employer's ability to bargain. However, I would not find that the degree of contractual control exercised by the RLA carrier is the determinative factor in deciding the jurisdictional question. As the Board recognized in *Management Training Corp*., 317 NLRB 1355 (1995), employers are frequently confronted with demands concerning matters which they cannot control because they have made a contractual relationship with private parties or public entities, but an employer's voluntary decision to contract away some of its authority over terms and conditions of employment should not be determinative of the Board's jurisdiction.